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In the Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTINE A. CRAFT,
Petitioner,

vs.

METROMEDIA, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals violate the Seventh Amendment, the *Erie* doctrine, and the legion of cases by this Court demanding scrupulous adherence to this "fundamental" and "important" federal guarantee of jury trial of fact issues, by reversing outright the factual findings and unanimous verdicts of two different juries composed of 18 persons fairly chosen from cross sections of two different Missouri communities of Kansas City and Joplin, who, after two lengthy trials, found in favor of Petitioner on her common law fraud claim?

(a) Does not the opinion below improperly reweigh and reexamine factual evidence properly submitted to a jury, so as to violate Missouri substantive law on sufficiency of evidence for a submissible case, opinions by the Eighth Circuit itself and other circuits, and opinions by this Court as exemplified by *Mercer v. Theriot*, 377 U.S. 152 (1964), so as to require this Court to exercise its vital power of supervision to correct the error by reinstating Petitioner's jury verdict?

(b) In view of an apparent trend toward more liberal reexamination of jury factual findings in federal, district and appellate courts, as disclosed by research of this past year's published opinions, should not this Court restate for this case and all federal jury cases, the rule stated by this Court with respect to non-jury cases in *Anderson v. City of Bessemer*, ... U.S. ....., 105 S.Ct. 1505, 1512, that "appellate courts

must constantly have in mind that their function is not to decide factual issues *de novo*."*

2. Does *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) require a court to accept as conclusive factual findings made by a jury in a consolidated case with common legal and equitable issues involving the same parties?**

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*In the past year, federal appellate courts have reversed, on factual grounds, approximately 45.1% of all appeals from jury verdicts in civil cases.

**This issue is presented by the petition in *Bellisimo v. Westinghouse Electric Corp.*, No. 85-786.

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OPINIONS BELOW

The decision of the court of appeals is reported at 766 F.2d at 1205 (8th Cir. 1985), and is set out in the Appendix at A1-A33. The unpublished order denying rehearing is set out at A36. The district court's opinion of October 31, 1983, is reported at 572 F.Supp. 868 (W.D. Mo. 1983), and is set out at A39-A70. The order of the district court of February 7, 1984, is in the Appendix at A73-A74.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1985. A timely petition for rehearing was filed, which was denied on August 19, 1985. On November 14, 1985, Justice Blackmun entered an order extending the due date for the petition for writ of certiorari to and including December 17, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE, RULE AND CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law.

Rule 38, Fed. R. Civ. P., provides:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Section 2072, 28 U.S.C., provides with regard to the Fed. R. Civ. P.:

> Such rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

STATEMENT OF THE CASE

Petitioner Christine Craft commenced this action in January, 1983 in the United States District Court for the Western District of Missouri, against her former employer, KMBC TV-9, an ABC affiliate owned during her employment by respondent, Metromedia, Inc. Trial proceeded in Kansas City July 25-August 8, 1983 on petitioner's claims of sex discrimination in violation of Title VII (42

U.S.C. §2000(e), *et seq.*) violation of the Equal Pay Act (29 U.S.C. §206) and common law fraud. Jurisdiction was invoked on the Title VII and Equal Pay Act claims under 28 U.S.C. §§1331 and 1343. Jurisdiction of the fraud claim was based on 28 U.S.C. §1332(a).

On August 8, 1983 a 6-person jury returned its verdict for petitioner on sex discrimination[1] and awarded her $375,000 actual and $125,000 punitive damages on her fraud claim, finding for Metromedia on the Equal Pay Act Claim. On October 31, 1983, the district court rejected the jury's recommended finding of sex discrimination, granted respondent's motion for new trial on the fraud claim and ordered, on its own motion, that the fraud retrial would be in Joplin before 12 sequestered jurors "to ensure the integrity of the jury." (A67). The Joplin jury also found for petitioner on her fraud claim, awarding $225,000 actual and $100,000 punitive damages. The district court denied Metromedia's motions for new trial and judgment n.o.v. (A74).

Petitioner asserted fraud because the station, in order to lure petitioner away from her news anchor position in California, falsely assured her in numerous pre-employment conversations that it was concerned only with her journalistic skills, and had no intention of attempting to make her over or change her by dictating her on-air appearance in matters of wardrobe and makeup. Petitioner alleged that once she began as co-anchor at KMBC, she was subjected to intentional discrimination on the basis of sex, being required, unlike male on-air personnel, to submit

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1. Because petitioner's claims of sex discrimination and fraud arose from the same nexus of overlapping operative facts, the jury sat as a Rule 39(c) advisory jury on the Title VII claim, and ultimately issued a general verdict in petitioner's favor.

to intrusive management regulation of her appearance, ultimately being removed from her position as co-anchor because of her sex.

Although many of the facts giving rise to this litigation were, and remain, in dispute, certain basic elements are not controverted. Before her employment by KMBC, petitioner was a television reporter/anchor in Santa Barbara, California, having previously held several other positions as a broadcast journalist. When respondent attempted to persuade her to take a position at KMBC, petitioner, who was not actively seeking any other employment, repeatedly insisted that she did not want, and would not accept, a job at KMBC if the station intended to make over her appearance or "change her into something she was not."

In response to petitioner's repeatedly expressed concerns, which emanated in part from petitioner's unpleasant experience with appearance requirements imposed on her in earlier employment for CBS Sports, KMBC officials made a number of verbal representations, the precise substance of which is in dispute, regarding how she would be treated. Undisputedly, however, KMBC officials never disclosed to petitioner that even before her employment they had begun to formulate plans with their media consultant to change petitioner's wardrobe and makeup styling, while expressly instructing the consultant not to disclose to petitioner the existence of those plans. Nor is there any dispute in the record that management never told petitioner of its always-extant belief that appearance was the number one criterion for a television news person at Channel 9, and that news director Ridge Shannon always believed that "having an attractive anchor was part of

the requirement for effective delivery of the news on Channel 9." (Tr. Vol. V at 119, 120).

According to petitioner, "from day one" management's "relentless" obsession was directed solely toward criticizing petitioner's supposedly asymmetrical face, her makeup deficiencies, the fact one eye was smaller than the other, her clothing selection and in requiring petitioner's attendance at "coaching" sessions on makeup, clothing and creating the "illusion of credibility" as preached by respondent's media consulting firm. Despite respondent's earlier assurances that Craft would be allowed to be herself, and that defendant had no intentions of changing her appearance because they liked her appearance, Shannon admitted he began criticizing Craft's appearance "from day one" of her employment and that he began working on her clothing and appearance from day one. (Vol. VI at 215, 230).

Media consultant Lynn Wilford, who testified Shannon had agreed—before Craft began work—that Craft's appearance "problems" would require a lot of work, was requested by Shannon to make an "emergency visit" to Kansas City on January 14, within 9 days of petitioner's debut, to work with weekend anchor Pam Whiting and Craft on their appearance problems. On "day one" Shannon told Craft one eye was too small, her jaw too square and her clothes did not look right. During her "emergency visit" of January 14, Wilford performed what the Court of Appeals described as the "ill fated" makeup application which Craft was forced to wear on air (A30, n.17), and gave Craft a detailed, specific "makeup analysis" containing directives by a woman Craft had never met. (A103-A106).

In January, 1981 Ridge Shannon ordered Craft to follow makeup and, clothing instructions given by the

consultants. Also in January, the media consultant took petitioner to Macy's for the purpose of choosing on-air clothing. In February, petitioner was sent to Macy's for clothes and began thereafter spending work time trying clothes on in front of the camera to be sent to the Dallas consultant for approval. In short, management's focus remained on petitioner's appearance "continuously" throughout her tenure.

In May, 1981, the consultant provided petitioner with a "four-week wardrobe" developed specifically for Craft per Shannon's direction, and Shannon ordered Craft to follow this buying strategy as closely as possible. In June, 1981, petitioner received her first "standards of performance" by which the station would evaluate and judge her work. The first two standards required (1) maintaining consistent makeup application and (2) not deviating from a dress calendar, both according to the approval of her two male supervisors, Shannon and vice-president Kent Replogle. By July, respondent was issuing detailed directives, including a mandatory "clothing calendar" from which petitioner could not deviate, which specified precisely what blazer, blouse and skirt or slacks petitioner was to wear each day, regulating for example, whether her necklace could consist of one string of pearls, two strings of pearls or a gold chain.

On August 14, 1981, respondent advised petitioner it had decided to remove her from her position as co-anchor. The reasons for the action were the subject of sharply conflicting testimony. Petitioner testified Shannon asserted she was being removed because the audience perceived she was "too old, too unattractive, and not deferential enough to men;" on the other hand, Shannon denied

having made that statement and asserted that Craft's appearance, wardrobe and verbal stumbling had created a communication barrier, and the audience perceived petitioner as a "buttinski". Respondent offered petitioner a position as reporter, but she declined the offer and returned to California, where she reassumed her previous position as co-anchor at station KEYT in Santa Barbara.

On appeal, the Eighth Circuit reversed outright petitioner's second unanimous jury verdict for fraud on the singular "narrow issue" (A28) of petitioner's asserted "failure of proof that [respondent's] statements of present intent were false when made." (A32). As noted in detail in petitioner's petition for rehearing (A75-A91), the Eighth Circuit made detailed findings of its own regarding the various disputed issues of fact bearing on the fraud claim, and in concluding KMBC had not misrepresented the terms of the proposed employment when the station hired petitioner. Petitioner appealed the trial court's adverse judgment on her Title VII claim, but the Eighth Circuit rejected her contentions and expressly refused to undertake the sort of fact-intensive analysis which had led it to reverse the jury's verdict. Compare the opinion's Title VII discussion (A11-A24), with the fraud portion. (A27-A31). Petitioner argued that the trial court's decision on her Title VII claim was inconsistent with the jury's verdict in the fraud claim. Since, however, the Eighth Circuit disagreed with the jury's verdict, it did not reach the issue of the extent to which that verdict, if sustained, would have controlled the resolution of her Title VII claim. Nor did the Eighth Circuit decide petitioner's claim that the trial court's first order of retrial was erroneous, thus requiring reinstatement of the Kansas City jury's $500,000 verdict.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE REPRESENTS THE HIGHWATER MARK OF A TIDE OF APPELLATE OVERREACHING THAT HAS, IN MANY CIRCUITS, LARGELY USURPED THE HISTORIC AND SACRED FACT FINDING AUTHORITY CONFERRED SOLELY ON CIVIL JURIES BY THE SEVENTH AMENDMENT; THUS, THIS COURT SHOULD GRANT THE WRIT TO RESTATE THE ESTABLISHED LINE OF DEMARCATION BETWEEN JUDGE AND JURY'S FUNCTION—WHICH WILL ENHANCE EFFICIENCY IN THE ADMINISTRATION OF JUSTICE AND RESTORE PUBLIC FAITH IN THE CERTAINTY OF EVERY PERSON'S CONSTITUTIONAL RIGHT TO CIVIL JURY TRIAL.

This Court's history as vigilant guardian of the constitutional right of all litigants to have a jury determination of factual issues is rich indeed. As this case starkly exposes, however, and as the following review of recent appellate decisions strongly suggests, unbeknownst to the citizenry and this Court, the constitutional right to a jury decision of fact issues in civil cases is being eroded, and the established history and binding precedent of this Court is being brazenly ignored to the point of obliteration, or relegation to a mere footnote in the history of constitutional jurisprudence.

Petitioner candidly acknowledges the danger that this case could be shrugged off as merely one isolated, individualized, fact-intensive injustice on a state law claim which —despite the widespread attention given the case—is un-

important in the larger scheme of cases which some feel this Court should review. Nothing could be further from the truth.

First, it is the overriding federal principle *in favor of* jury trials which has most often generated recent opinions by this Court safeguarding and reiterating such rights where state law, or the clash of legal vs. equitable issues raises an issue as to the first clause of the Seventh Amendment, which requires that "the right of jury trial shall be preserved." Of late, Mr. Justice Rehnquist has provided a most eloquent tribute to, and complete review of the "valued" and "fundamental" right to jury trial in civil cases in his dissent in *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 337-356 (1979):

> maintenance of the jury as a fact-finding body *is of such importance and occupies so firm a place in our history and jurisprudence* . . . any seeming curtailment of the right to a jury trial should be scrutinized with utmost care.

(Emphasis added) *Id.* at 346. Justice Rehnquist's rich praise of "[t]he important federal policy favoring jury decisions of disputed fact questions," underscores the *general* importance of the issue in this case.

Moreover, this case focuses, not on the first clause of the Seventh Amendment, which "preserves" the right to have a jury trial, and has been the subject of more recent decisions by this Court, but instead reveals a grave constitutional problem of "reexamination" of facts tried by a jury—twice tried in this case. In the 40's, 50's and into the mid 60's, this Court repeatedly reversed wrongful factual reexamination of jury verdicts by appellate courts in literally dozens of cases—dominated by, but not wholly

comprised of, FELA and Jones Act cases.[2] Numerous other full opinions and *per curiam* reversals establish, however, that this Court's firm constitutional policy forbidding factual reexamination and weighing of evidence by appellate courts governs *all jury cases* in federal courts.[3] If there is any doubt, this case squarely raises the issue, and *cert.* should issue because, "A decision by the Supreme Court, clearly stating . . . the scope of the FELA and Jones Act cases, would be of helpful guidance to lower federal courts." 9 Wright & Miller, *Federal Practice and Procedure*: Civil §2526, p. 559.

This Court must wield its supervisory power to restore in jury cases what was restored to non-jury cases by *Anderson v. City of Bessemer City*, ... U.S. ....., 105 S.Ct. 1504 (1985), an end to "*de novo*" fact finding by appellate courts, with its resultant duplication of fact finding at "huge cost in diversion of judicial resources." *Id.* at 1512. This issue cries out for attention today to restore public confidence in the system, and faithfulness to the principle of *stare decisis*. One eminent commenator/lawyer once observed that this Court's supervisory jury guardianship in years past had resulted in "[l]ower court's, state and

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2. In general see 4 L. Ed. 2d 1787: *Supreme Court Review of Sufficiency of Evidence in Actions Under Federal Employers' Liability Act; Wilkerson v. McCarthy*, 336 U.S. 53, 55 (1949) (numerous cases cited by Justice Douglas); *Rogers v. Mo. Pacific R. Co.*, 352 U.S. 500 (1957) (and numerous cases cited therein); *Harris v. Pa. R. Co.*, 361 U.S. 15 (1959) (cases cited by Justice Douglas); *Gallick v. Baltimore & Ohio Rd. Co.*, 372 U.S. 108 (1963).

3. *Dick v. New York Life Ins.*, 359 U.S. 437 (1959) (life insurance case); *Continental Ore v. Union Carbide*, 370 U.S. 690 (1962) (antitrust); *Mercer v. Theriot*, 377 U.S. 152 (1964) (wrongful death); *per curiam* reversals: *Williams v. Carolina Life Ins. Co.*, 348 U.S. 802 (1954) (verdict on life insurance policies); *Swafford v. Atlantic Coast Line R. Co.*, 350 U.S. 807 (1955) ($9,875 verdict for negligence under Florida law); *Union Trust Co. v. Eastern Airlines*, 350 U.S. 907 (1955) (wrongful death); *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956) (negligence action).

federal, . . . leaving issues to juries today, when, even as recently as two or three years ago, they would have resolved them as matters of law."[4] *Certiorari* should be granted today, therefore, to emphasize—particularly in this patently and egregiously wrong usurpation of 2 juries—that this Court's long line of decisions on sufficiency of evidence for a jury question was not a mere quirk of history or a product of the personal proclivities of the Justices serving at the time. Rather, this Court's decisions represent the solemn, binding pronouncements of the law of the land.

The magnitude of the current erosion of the jury's constitutional position as fact finder, as exemplified most palpably by the instant case, is demonstrated by a single statistic.[5] In the last year the Federal courts of appeals have considered 233 cases in which a party challenged the correctness of a jury's verdict; the appellate courts reversed the challenged verdict, in whole or part, in 105 cases. Thus in fully 45.1% of these cases the appellate courts conducted their own unconstitutional reexamination of the evidence, disagreed with the verdict of the jury below, and substituted their view of the facts for that of the jury. In almost all of the 105 reversals, the district judge who presided at trial had sustained the very verdict with which the appellate court disagreed.[6] The appellate

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4. DeParcq, *The Supreme Court and the Federal Employers' Liability Act, 1958-1959 Term*, 44 Minn. L.Rev. 707 (1960); see also Arnold, *Professor Hart's Theology*, 73 Harv. L.Rev. 1298 (1960).

5. The statistics set forth in this section summarize results of the survey of Appellate decisions described in detail at pages A107-A128 of the Appendix.

6. The same is true here, yet magnified, inasmuch as during the course of *two* trials the same district judge whose sex-discrimination findings were found to be impervious to attack had ruled the evidence of fraud sufficient for the jury no less than 6 times.

reversal rate does not include cases in which a jury verdict was overturned because of purely legal issues, such as the correctness of jury instructions or the admissibility of evidence.[7]

This pattern of appellate fact finding would represent an intolerable disregard of the commands of the Seventh Amendment regardless of whether the burden of that constitutional infraction fell equally on plaintiffs and defendants alike. But the appellate courts have not reviewed with an equal degree of overzealousness verdicts favoring all parties. On the contrary, the courts of appeals have been far more likely to overturn a verdict if the jury found facts favorable to the plaintiff:

Reversal Rate By Party: All Cases

Jury Verdict In Favor Of	Reversal Rate[8]
Plaintiff	51.0%
Defendant	20.0%

The difference in reversal rates is even greater when commercial cases are excluded:

Reversal Rate By Party: Non-Commercial Cases

Jury Verdict In Favor Of	Reversal Rate
Plaintiff	57.9%
Defendant	12.5%

7. The appellate courts reversed jury verdicts in their entirety in 45 cases (19.3%), reversed jury verdicts in part in 38 cases (16.3%), and reversed jury verdicts on the ground that the amount of the verdict was excessive in 22 cases (9.2%).

8. This figure represents all three types of reversals referred to in note 7.

The possibility that these disparities could have occurred by chance is less than 1 in 10,000.[9] The differing treatment of verdicts for plaintiffs and defendants provides a striking confirmation of Justice Rehnquist's observation in *Parklane Hosiery v. Shore, supra,* 439 U.S. at 344 (dissenting opinion), that the Seventh Amendment was adopted because the framers knew that "[a] jury would reach a result that a judge either could not or would not reach."[10]

A more detailed examination of appellate decisions reveals that appellate judges have been particularly aggressive in reversing jury verdicts in certain types of cases:

Reversal Rate By Subject Matter: All Cases

Type Of Litigation	Reversal Rate
Constitutional	55.6%
Discrimination	52.6%
Personal Injury	40.5%
Commercial	37.3%

The disparity in reversal rates is even higher when the analysis is limited to cases in which the jury returned a verdict in favor of the plaintiff:

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9. This probability is calculated by applying a standard chi square test.

10. A special concurring opinion by Judge Garwood in *Springborn v. American Commercial Barge Lines, Inc.*, 767 F.2d 89 at 101 (5th Cir. 1985) aptly explains the need for equal consideration of both parties in a civil jury case:

> The directed verdict-judgment n.o.v. standard can be seen either as a jurisdictional boundary—marking the division of power between judge and jury—or as a means to help ensure that judgments rest on factual truth. In neither perspective is use of a double standard appropriate. If we trust the jury as a decision maker, we must trust it to decide for either party. Otherwise we demean the jury which is so hallowed in our traditions and in our Constitution. . . . The whole concept of an independent judiciary and the rule of law as we understand it, and have understood it for centuries, is based on rules of general application evenhandedly applied.

Reversal Rate By Subject: Verdict For Plaintiff

Type Of Litigation	Reversal Rate
Constitutional	70.6%
Discrimination	55.5%
Personal Injury	48.3%
Commercial	35.9%

Verdicts in favor of defendants in constitutional cases were reversed, however, only 9% of the time. The practice of according juries greater deference in commercial cases, while regarding as particularly suspect a verdict that government officials had violated the Constitution, stands on its head the policy of the Seventh Amendment, which was intended above all as a "bulwark" against government "tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it may be added, *to that of the judiciary.*" (Emphasis added). *Parklane, Id.* at 343.

Not all circuits have indulged in this practice of appellate disregard of jury verdicts. The first and ninth circuits have been appropriately restrained in their review of jury fact finding, while the second circuit has been particularly aggressive in setting aside jury verdicts.[11]

11. Reversal Rate By Circuit

Circuit	Reversal Rate
Second	73%
Third	58%
Fourth	58%
Eighth	56%
Fifth	51%
District of Columbia	43%
Eleventh	35%
Tenth	31%
Sixth	26%
First	25%
Ninth	9%

(Continued on following page)

Because of variations in the number of decisions in each appellate court, undue weight should not be attached to the precise ranking of each circuit. Nonetheless, the wide variation in the reversal rates demonstrates the conflicting views of the circuit courts regarding the propriety of overturning jury verdicts. This conflict should be addressed and authoritatively resolved by this Court.

The practice of overturning jury verdicts in civil cases has become so widespread and accepted that the appellate courts rarely bother to pay even lip service to the extremely stringent constitutional and statutory standards such reversals are supposed to meet. The right to a jury trial in civil cases, and the attendant right against appellate re-examination of jury fact finding, are guaranteed by the Seventh Amendment, section 2072 of the Judicial Code, and Rule 38(a) of the Fed. R. Civ. P. As noted earlier, in numerous cases involving a variety of statutory and common law jury claims during the last century, this Court has emphasized that appellate courts are to overturn jury factual findings only in extreme and exceptional circumstances. Yet among the 105 appellate decisions reversing jury verdicts in the last year, however, petitioner could find only 5 incidental references to the Seventh Amendment,[12] scant references to any of *this Court's* decisions announcing the applicable legal stan-

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Footnote continued—

This table omits appeals in the Federal Circuit and the Emergency Court of Appeals, which decided only two and one such cases, respectively.

12. *Seventh Amendment references*:

Springborn v. American Commercial Barge Lines, Inc., 767 F.2d 89 (5th Cir. 1985); *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266 (6th Cir. 1985); (also cites Rule 38(a)); *Bonjourno v. Kaiser Alum. & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1985); *Smith v. Shell Oil Co.*, 746 F.2d 1087 (5th Cir. 1985); *McKinnon v. City of Berwyn*, 750 F.2d 1383 (7th Cir. 1985).

dards, one oblique reference to Rule 38(a), and no references at all to 28 U.S.C. §2072.

It is inconceivable that the framers of the Seventh Amendment ever intended that a day would come when federal appellate courts could reexamine and reverse almost half of all civil jury verdicts attacked on appeal. The literal language of the amendment forbids such appellate action except under the very narrow circumstances permitted under common law in the eighteenth century. The framers understood that juries and judges often would disagree about the merits of civil cases, and adopted the Seventh Amendment to guarantee that where such differences arose the views of the jury would ordinarily prevail:

> Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense . . . and thus keep the administration of law in accord with the wishes and feelings of the community.

Parklane Hosiery Co. v. Shore, supra, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting). The present appellate practice, like the Vice-Admiralty courts denounced by the Declaration of Independence, subordinates to the personal views of a handful of judges, who, as noted by Justice Rehnquist are "permanently attached to the sovereign," the sense of justice of Seventh Amendment juries and of the community which those juries represent. *Id.* at 348-49.

Twice in recent years this Court has granted *certiorari* to delineate the limitations imposed by Rule 52 on appellate review of the findings of fact of a trial judge. *Anderson v. City of Bessemer City,* ..... U.S. ....., 105 S.Ct. 1504 (1985); *Pullman-Standard v. Swint,* 456 U.S. 273 (1982). While the problem in those cases concerned only the allo-

cation of fact finding authority among Article III judges, the appellate practice exemplified by the instant case is an abuse of constitutional magnitude. Because violations of the Seventh Amendment, when they occur, are occasioned by the actions of federal judges, rather than executive or legislative officials, and thus can only be corrected by this Court, the Court possesses unique constitutional responsibility to supervise the manner in which the lower courts are reexamining jury verdicts. As noted, a generation ago, when lower court judges repeatedly were interfering with jury verdicts, this Court repeatedly granted *certiorari*—if only for a one line *per curiam* reversal—[13]to reinstate the decisions and prerogatives of civil juries. Today, when such judicial interference extends to jury verdicts in a wide variety of constitutional and statutory actions, *certiorari* is even more appropriate.

II.

THE CIRCUMSTANCES OF THIS CASE PRESENT PRECISELY THE SORT OF DISPUTED FACTUAL ISSUES WHICH THE SEVENTH AMENDMENT, THE DECISIONS OF THIS COURT, THE EIGHTH CIRCUIT ITSELF, AND MISSOURI COURTS CONTEMPLATE SHOULD BE RESOLVED BY A JURY.

Space limitations prevent a point-by-point exposure of the instances in which the Court of Appeals unlawfully,

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13. Petitioner urges that plenary review is appropriate in this case. In any event, due to the wide exposure this case has garnered, and the widespread public knowledge of appellate reversal of facts found by two juries, the purposes of *certiorari* and the broad goal of consistent, evenhanded administration of justice would be well served even if this Court grants *certiorari* simply to issue a one-line reversal reinstating petitioner's Joplin verdict.

undeniably "finds facts" in utter conflict with evidence supportive of Craft which is—or should have been—binding on appeal. Petitioner's Petition For Rehearing And Suggestions For Rehearing En Banc (A75-A97) must be read with care, since is provides graphic, indisputable, transcript-annotated proof of this fatal error. *Mercer v. Theriot,* 377 U.S. 152, 156 (1964), *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 444 (1959). The fact the Court of Appeals unabashedly reexamines and reweighs strictly jury issues fairly leaps from the opinion. Weighing conflicting evidence is strictly for the jury. *Cunning v. Cooley,* 281 U.S. 90, 94 (1930). Indeed, the opinion blatantly violates this Court's decisions, its own decisions, and Missouri law by explicit crediting of *respondent's* contradicted evidence. *Wilkerson v. McCarthy,* 336 U.S. 53, 57 (1949); *Dace v. ACF Industries, Inc.*, 722 F.2d 374, 376-77 (8th Cir. 1983), supplemented, 728 F.2d 978 (8th Cir. 1984); *Simpson v. Skelly Oil Co.*, 371 F.2d 563, 567 (8th Cir. 1967); *Bayne v. Jenkins,* 593 S.W.2d 519, 521 (Mo. banc 1980).[14]

The resolution of this case, according to the Court of Appeals, came down to inferences, i.e. whether conceded intent to change Craft's appearance allowed a permissible conclusion defendant intended to pursue a "makeover" or "substantial" changes—as those two terms were defined by the appellate court. Surely, defining and applying to the

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14. A singular, egregious revelation of the single-minded bias of the Eighth Circuit is that the initial opinion flatly quoted Craft for testimony given by news director Shannon. (A30). When petitioner led off with this revealing fact in her rehearing petition (A78-A79), the appellate court simply modified its opinion (A36-A37) by correctly attributing the testimony to Shannon—blithely ignoring the undeniable bias and improper reweighing and reexamining of evidence which had been chillingly exposed. See also the opinion's footnote 16 at A29, which refers, inexplicably, to evidence of *defendant's* key state of mind testimony, that had become—or should have become—"*irrelevant* upon appeal". *Lavender v. Kurn,* 327 U.S. 645, 652-53 (1946).

evidence the common words "substantial" and "makeover" used in the jury charge can only be for the jury based on its personal exposure to all the evidence. Not so, according to the Eighth Circuit. Unquestionably, as shown by direct and circumstantial evidence set out in detail in the Petition For Rehearing (and in the Court of Appeals opinion), a jury reasonably could have inferred that KMBC intended, at the very time it recruited Craft with contrary representations, to substantially change or make over her appearance.[15] The decision whether or not to draw such an inference was a matter for the jury. *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944); *Pinken v. Frank*, 704 F.2d 1019, 1026 (8th Cir. 1983); *Allison v. Mildred*, 307 S.W.2d 447, 453 (Mo. 1957).

The critical portion of the Eighth Circuit's opinion reads like the factual findings of a district court judge after a bench trial. The appellate court credited the critical defense witnesses, resolved conflicts in the testimony in favor of the defendant, and drew the inferences least favorable to petitioner. (A28-A31). Although the Eighth Circuit opinion is prefaced with an obligatory acknowledgement of the importance of the jury, the substance of the

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15. As was properly raised in Petitioner's Petition For Rehead (A95, fn. 13), *Neely v. Eby Construction Co.*, 386 U.S. 317, 325 (1967), even the erroneous rendition of evidence in the appellate court opinion would justify submitting to the jury the alternative basis for fraud, under Missouri law, that respondent's representations were made "without knowledge of their truth or falsity." *Wilson v. Murch*, 354 S.W.2d 332, 339 (Mo. App. 1962). Or Craft may be entitled to reinstatement of the $500,000 Kansas City verdict, since the verdict director said nothing about "substantial changes" (of which the opinion finds petitioner's evidence lacking), but was framed in the terms, "intended no changes." For instruction errors, where petitioner could meet the sufficiency threshold (which the opinion itself establishes) petitioner is, at a minimum, entitled to a new trial. *Weade v. Dichmann Wright & Pugh, Inc.*, 337 U.S. 801 (1949); *F.&H. Investment Company, Inc. v. Sackman-Gilliland Corporation*, 782 F.2d 1050, 1055 (8th Cir. 1984).

opinion belies that *pro forma* introduction. On the Eighth Circuit's view of the evidence, the critical issue was what Craft and KMBC meant when they agreed that KMBC would not "make over" Craft's appearance. The court of appeals recognized that KMBC attempted to "make over" petitioner's clothes, but held that the agreement covered only facial makeup and hairstyling:

> [W]e believe that in her audition interviews with KMBC Craft was concerned essentially with her hair and makeup and not her clothing. (A30) (Emphasis added).

Putting aside that this appellate fact-finding is blatantly false as shown in the Petition For Rehearing (A81-A85), this passage in the Eighth Circuit's opinion is devoid of any pretense that the interpretation of the agreement was a matter for the jury, or that the evidence somehow compelled this particular interpretation. Indeed, because such appellate fact-finding was always disproved with contrary evidence in the record, the "factual finding" indulged by the Court of Appeals was impossible to make as a matter of law; because under the standard announced but ignored in the opinion itself, the evidence did not, in *any* respect "point all one way."

The subject matter of this case is one which makes it particularly likely, and inappropriate, that judges will disagree with the conclusions of a jury drawn from a cross section of the community here *two* completely disparate communities. A resolution of this case rested to some extent on assumptions about the point at which a broadcaster's tampering with the clothes and hairstyle of a female journalist become "substantial," unreasonable and "intrusive." Those assumptions would turn in part of

a *fact finder's* view of whether as a general matter an employer should be free to require female employees, not only to do their jobs competently, but also to wear clothes, makeup and hairstyles that strike the fancy of management officials. These are issues about which men and women differ frequently and, at times, vociferously. The purpose of the Seventh Amendment is to place the resolution of cases such as this in the hands of a jury which will reflect the diversity of public sentiment on related controversial issues. A jury representing a cross section of the community will differ in a variety of ways from the composition of the federal judiciary; with regard to sex, women will typically be close to half of any jury, while appellate judicial panels, as here, are frequently all-male. In light of the sensitive and controversial nature of the issues underlying this litigation, the appellate panel should have been, and was not, particularly reluctant to reconsider the verdict of the jury—particularly after two juries from two separate and different communities had engaged in the all-important deliberative process utilizing all the components of demeanor, credibility, community values and common sense which are the hallmark of the jury process and the minimum which must be preserved in the genuine fact-finding process.

III.

THIS COURT SHOULD AUTHORITATIVELY DECIDE WHETHER NON-JURY FACTUAL FINDINGS MUST BE CONSISTENT WITH JURY FINDINGS. WHERE OVERLAPPING ISSUES ARE TRIED IN THE SAME CASE.

Six years ago in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), this Court held that litigation of a factual issue in a non-jury trial would have binding collateral

estoppel effect in a later trial—even in the face of a Seventh Amendment demand for a jury trial in the later case. That is, the jury must accept as conclusive a prior factual finding by a judge in an equitable proceeding. The question presented by this case is the obverse of that in *Parklane*: whether a court in an equitable proceeding must accept as conclusive the prior factual finding of a jury.

In August, 1983, the first jury to hear this case sustained petitioner's fraud claim and, acting in an advisory capacity, recommended a finding that KMBC had violated Title VII by discriminating against petitioner on the basis of sex. On October 31, 1983, the district court directed a new trial of the fraud claim and, without awaiting the results of that retrial proceeded to resolve the Title VII claim, rejecting the original jury's recommendation and holding that KMBC had not engaged in unlawful discrimination.

By laying side-by-side the trial court's Title VII opinion, and the Eighth Circuit's decision regarding the fraud claim, it becomes clear that the critical factual issues are largely the same. Thus it is no wonder the Court of Appeals often misstated evidence in a manner unfavorable to Craft, since the district court opinion resolved *every* contested factual issue *against* plaintiff.[16]

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16. It is ironic that the Appeals Court admonishes Craft more than 25 times that the district court's factual sex-discrimination findings could not be disturbed, only to abandon all deference to the jury as fact finder, and the decision of this same district judge, who rejected defendant's arguments against submissibility of fraud at least six times over two lengthy trials. The Court of Appeals defies law and logic to hold that every aspect of Judge Stevens' memorandum order was impervious to attack—except his profoundly correct rulings that the motion for judgment n.o.v. should be denied. (A63; A74). This duplicity flies in the face of law requiring deference to the trial judge and his unique in-person knowledge on submissibility of evidence. *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 447 (1959), *Melia v. Ford Motor Co.*, 534 F.2d 795, 799 (8th Cir. 1976).

The district judge's dismissal of the Title VII claim was based primarily on a finding which both juries necessarily rejected in sustaining the fraud claim—that petitioner wanted and agreed in advance to management control of her clothes and makeup (A43), and that KMBC only decided to interfere with these matters after it became dissatisfied with petitioner's work, rather than based on any present intent or plan that predated her employment, finding management proceeded "cautiously and gradually." (A58). The trial court's decision thus rested, at least in part, on premises squarely inconsistent with both jury verdicts on the fraud claim.[17]

Both the Second and Eleventh Circuits have held that, where legal and equitable claims overlap, "on an issue involved in a legal claim, the judge is of course bound by the jury's determination of that issue as it affects his disposition of an accompanying equitable claim." *Lincoln v. Board of Regents of Univ. System*, 697 F.2d 928, 934 (11th Cir.), *cert. den.* 104 S.Ct. 97 (1983); *see also Caputo v. United States Lines Co.*, 311 F.2d 413, 416 (2d Cir. 1963) ("The court must follow the verdict of the jury.").

Petitioner argued in the Eighth Circuit that the district court's decision on the Title VII claim should be reversed because it was inconsistent with the verdict of the jury.

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17. It is revealing on the command to weigh all evidence in the light most favorable to the jury winner that the appellate opinion sets out as "facts," both of these conclusions from the district court: (1) "Craft indicated some willingness to work on her appearance and dress." (A4). Craft testified at the fraud trial, "No I did not indicate that I would need help in those areas." (Vol. II at 143-44) (See A30-A31); (2) "In fact the record is basically uncontradicted as to the gradual increase in the intensity of the measures taken by KMBC in regard to Craft's appearance." (A31). Craft's testimony disproved this myth when she said management interference was "continuous" and "relentless" "from day one" until her removal. (Vol. I Pt. 2, 130-37, 171-72, 193) (See A87-A90).

The Eighth Circuit did not reach this issue, since the appellate panel reversed that jury verdict. (A32). Should *certiorari* be granted on question 1, we urge that it be granted as well on question 2, so as to permit a consistent disposition of these interrelated claims. The same issue regarding the scope of *Parklane* is now pending before this Court in *Bellissimo v. Westinghouse Electric Corp.*, No. 85-786.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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